Understanding Public Procurement Judicial Review

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UNDERSTANDING PUBLIC PROCUREMENT JUDICIAL REVIEW: BEYOND GOVERNMENT REFORM

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Summary

This research responds to recent Government Reforms, adopted in July 2013, concerning the role of public law judicial review in resolving public procurement disputes (public procurement judicial review).
It does so by: i) advancing understanding of what types of challenges are being brought to the Administrative Courts. ii) providing a critical insight into the benefits, disadvantages and consequences of the Reforms to public procurement JR.

The Purpose of Judicial Review in Resolving Public Procurement Disputes:

- **Theory:** The role of public procurement judicial review is to hold public bodies to account in ensuring they fulfil their public obligations and duties within their procurement exercises.
- **Reality:** Public procurement judicial review is used as a means of resolving disputes most commonly in 3 different circumstances. i) when the contract value is below EU thresholds ii) in claims by economic operators where a more suitable remedy is available through the Administrative Courts iii) in claims by third parties with an interest in seeing that the public procurement rules are followed.
- Today procurement is no longer a purely domestic matter. Instead there are tensions between international, European and domestic goals.
- European Union law, contract law principles and public law obligations all have a role to play in resolving such disputes. (These questions are recognised as being more complex than just issues for public procurement judicial review litigation.)

Brief Summary of Findings:

- The case law analysis identifies that there are a **minimal** number of public procurement legal challenges brought by means of judicial review each year. (The reported sample shows 2-4 cases per year on average)
- While there is evidence to suggest, from the reported cases, that there has been an increase in recent years (such as in 2012) the growth was not at a level predicted by the Ministry of Justice in their 2012/13 Reports.
- From the sample identified, the judiciary, on the whole, refused or rejected more public procurement judicial review applications/appeals than they allowed, or approved, between 1970 and 2013.
- **The role and function of public procurement judicial review has changed:** The cases sampled indicate that in 2011 and 2012 there was an increase in claims relating to ultra vires/illegality and irrationality. However in 2005 the established precedent was that public procurement matters relating to irrationality were not for judicial review to address. Other recent changes include judicial review action being brought when other remedial routes were available under the Regulations.

Government Reform:

- **Benefits:** A reduction to 30 days for bringing a JR claim mirrors the time period for bringing action under the EU Regulations. (Thus creating greater certainty for public procurers as to the period within which a challenge can be brought.)
- **Disadvantages:** Misconceived comparisons have been brought as to who can bring a JR claim: for example third party claimants under the judicial review route who are seeking to enforce a Regulation obligation may need longer than 30 days.
- **Consequences:** Potential problems and uncertainty as to when the 30 days runs from. Similarly there are potential problems with constructed knowledge and extensions to the time limit for bringing a judicial review claim. Furthermore there are evident uncertainties as to how the existing rules developed in the *Uniplex* case are going to operate now under the reduced time limits for commencing proceedings.

This research forms part of a PhD thesis looking at the impact, and differences in the operation, of commercial judicial review, opposed to traditional public law judicial review.

Background

- In December 2012 the Ministry of Justice conducted a consultation exercise entitled *Judicial Review: Proposals for Reform*. The Reform proposed a package of measures that the Government felt would stem the growth in applications for judicial reviews. The measures' aim was to tackle the burden that this growth has placed on stretched public services, whilst protecting access to justice and the rule of law.
- One of the proposals for reform was to reduce the time limit for bringing a claim by means of judicial review from 3 months to 30 days, in cases where the dispute relates to a public procurement Regulations claim.
- Within the consultation documents there were vague and unclear references as to how many public procurement disputes were being brought by means of judicial review. (*"hard to identify exactly how many…possibly a few hundred in 2011"* MoJ *Judicial Review: Engagement Exercise: Impact Assessment* p11-12.) The Government recognised that exact data pertaining to how many claims were being brought was unavailable.
- The consultation process responses did not favour a reduction in the time limit. (73% disagreed with the recommendations in relation to public procurement, with most referring to issues of uncertainty over what was being proposed.)
- Nevertheless, the Government introduced the Reform in July 2013, disregarding the concerns highlighted in the responses to their consultation process. Their key argument for doing so was that the change brought greater clarity and certainty for public procurers, by mirroring the same time period for bringing a claim under the EU Regulations.

Study Rationale

- In order to look beyond these Government reforms, this research identifies two broad areas for further investigation. Firstly, what types of public procurement judicial review challenges are being brought to the Administrative Courts? Secondly, in light of such findings, what are the likely consequences of the Government's reforms that reduce the time limit for actioning a public procurement claim?
- In order to assess the different types of public procurement disputes being brought by means of judicial review, 70 cases, as a sample, were identified using online law databases. The earliest reported case available dated back to 1970.
- Six categories were devised pertaining to the grounds by which these public procurement challenges were brought. These issues were thereafter classified as matters of either **primary importance** (the core reason why the claim was being sought); **secondary importance** (a sub-consideration to the primary claim); or **points made in passing/obiter dicta**. (An individual case could have given rise to more than one issue from a multiple of the three categories.)
- From this sample of 70, 57 cases were primarily concerned with public procurement judicial review. A further 13 judicial review claims, while not exclusively matters pertaining to public procurement litigation, were included as such judgements contained obiter dicta comments of interest to analytical research in this area. (These 13 cases are not referred to in the *Primary Public Procurement Judicial Review Issues by Year* findings below.)
- Limits of the research findings: The sample used to generate these findings relates to reported cases only. *(Not the total number of public procurement judicial review claims within the UK.)*

Findings

The Rise in Public Procurement Judicial Review Claims?

The highest periods of judicial activity in the sampled period of 1970 to 2013, were 2006, 2007, 2009, 2010 and 2012; with 2012 seeing the most, and 2009 and 2010 seeing second highest number of cases.

Reasons for Growth in 2012:

The most significant contributing factor to the increase in 2012 was the rise in the number of claims on grounds of **ultra vires and illegality**. Nevertheless while 2012 saw the most significant increase in judicial activity, it also saw the greatest period of negative treatment of applications at the same time. Of all the cases being brought for claims of ultra vires in 2012 only one application was granted, and another was partly granted.

Reasons for Growth in 2009-2010: Problems with Time Limits for Bringing Claims (Prior to July 2013 Reform)

- **Judges clarifying the rules regarding time limits for bringing a claim**. Following *Uniplex* C-406/08, questions arose as to whether the test of promptness in judicial review cases satisfied EU law requirements. Two problems were identified by the Advocate-General. Those in relation to when the time limit began, and secondly what constituted promptness. The AG ruled that the time ran from the date of knowledge, not the date of the decision, and that the promptness test could not operate as there was a lack of legal certainty. *(Potential for problems again post July 2013 Reform)*

Primary Issues Being Addressed Within The Sample

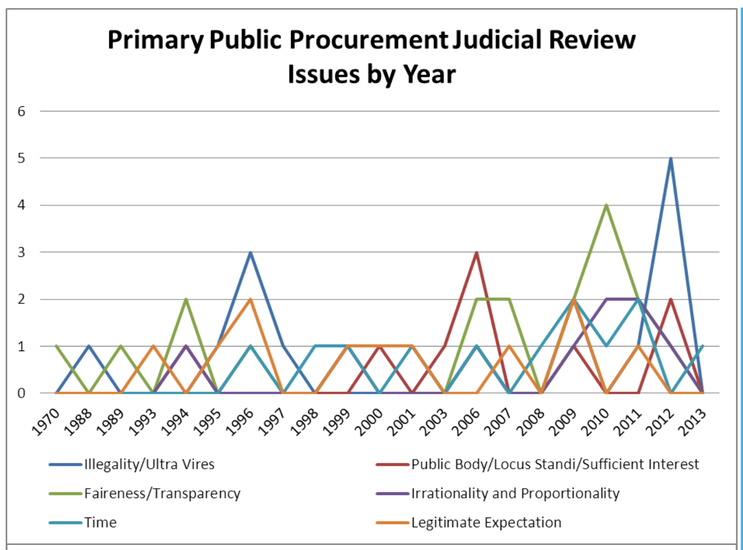
From the total sample, 77 primary issues were identified. 14 featured issues of ultra vires/illegality as their primary concern (accounting for 18%), 9 cases featured issues of locus standi/sufficient interest (12%), 21 cases were primarily concerned with issues of fairness and transparency (27%), 8 featured issues of irrationality and proportionality (11%), 14 addressed questions pertaining to time (18%), and 11 cases concerned issues relating to legitimate expectation (accounting for 14% of the sample).

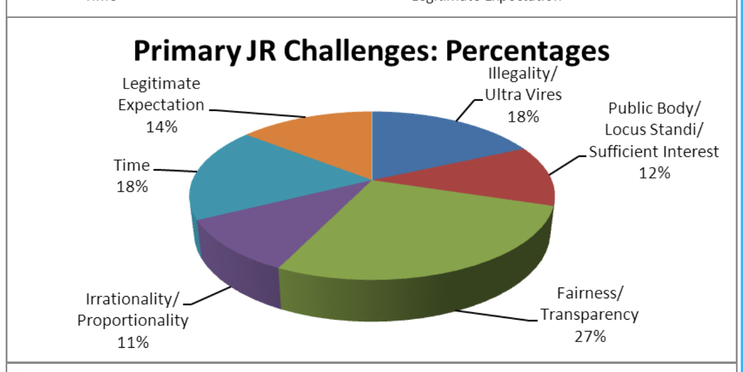
Positive and Negative Judicial Treatment of Claims

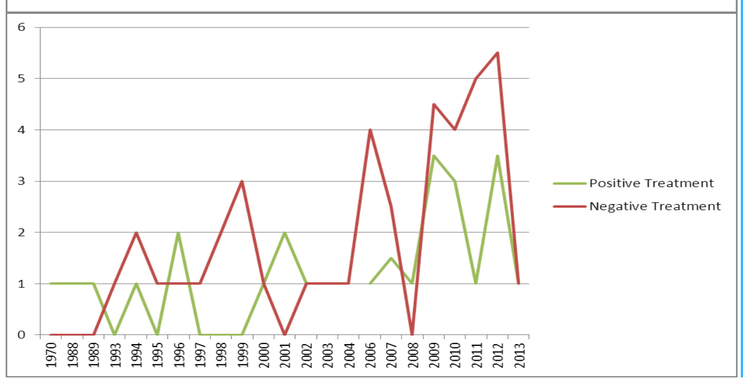
Throughout the sampled period approximately 38% of applications and appeals were permitted or approved; with approximately 60% rejected or dismissed. In 2012, while there were more cases going through the Administrative Court, 61.11% of all claims were either rejected or dismissed by the Court. In 2009 the rate of dismissal, or refusal stood at 56.25% of the total sample, and 57.14% in 2010. Only in 1970, 1988, 1989, 1996, 2001 and 2008 were there more applications for judicial review approved, or appeals allowed, than not allowed, or dismissed.

Claims by UK Region

From the sample, 84% of cases arose in England, 6% in Wales, 4% in Scotland and 6% in Northern Ireland.
From these regional samples, 42% received positive judicial treatment in England, 0% in Wales, 25% in Scotland and 25% in Northern Ireland.







Analytical Findings from the Case Law Analysis

From the case law findings the following points of interest were identified:

Questioning Motives: *Restricted views on claims by third parties*

- In *Chandler* [2010] LGR 1 questions arose as to the *locus standi* of third parties in bringing judicial review claims pertaining to procurement practices for the building of academy schools. (There was no possibility for bringing a claim under the Regulations, as, at Part 9, only economic operators can bring such claims.) Here the ruling was restrictive in stating that third party claims will only be permitted by individuals who have a concern pertaining to the procurement process itself, not some general concern as to the subject matter of the procurement exercise.

Changes: *Problems with Irrationality?*

- In *Cookson* [2005] EWCA Civ 811, Lord Justice Buxton stated in his judgement at para 18 *"It is…difficult to fit allegations of irrationality or unfairness into the framework of a separate application (meaning judicial review) different from complaints under the Regulations. That is because the award of the contract, where the irrationality…is said to have arisen as part of the tendering process, is governed by the Regulations."* However the sample identified that claims of irrationality were brought using the public law route in 2009 and 2010 (11% of the total sample related to irrationality claims, a good example of such can be seen in the case of *Youth Justice Board* [2009] EWHC 2347)

Changes: *Judicial review should only be used when all other routes have been exhausted?*

- It had been previously established that a claim for judicial review should only be brought once all other remedial possibilities have been exhausted.
- Today there is evidence that this rule has changed. More recent jurisprudence has suggested that some questions are better addressed by invoking public law obligations through judicial review.

i) In the *Legal Services Commission* [2007] EWCA Civ 1264 questions pertaining to the provisions of publicly funded legal services were determined as better addressed by means of judicial review. However here the solicitor practices were clearly economic operators, with a right to challenge under the Regulations.

ii) In *Watters* [2009] NIQB 71, the applicant, an accountancy firm in Northern Ireland, was invited to develop an outlined business proposal. This was to include funding propositions that would be sought for a programme administered by Sport Northern Ireland. Problems arose over a 2 minute late bid and potential inequalities amongst the tenderers. Whilst this is recognised as a quasi-procurement case, with the potential for legal action under the Regulations, here the legal questions were deemed to be more appropriately addressed by public law and judicial review-particularly those in relation to procedural fairness.

iii) Virgin Trains Limited tried to instigate claims under both the Regulations and by means of judicial review over their dispute pertaining to the West Coast Main Line procurement process in 2012/13. While Virgin Trains later proceeded to drop their claim, their actions suggest that the aggrieved tenderer was seeking to draw benefits from both remedial routes.

Beyond Reform?

Comments:

- The Government reforms have not entirely brought the intended benefits of certainty for public procurers as to a universal 30 day time limit for instigating a claim both under the Regulations and by judicial review. As established in *Uniplex*, the time limit will still run from the date of actual knowledge, this may not necessarily be the same date as when the decision was made. Furthermore, under the judicial review route, the judges still have the discretion to extend the time limit.
- Attempts to reduce the number of public procurement JRs, by shortening the time limit for actioning a claim, are unlikely to impact on the overall number of judicial reviews. (Adopting the MoJ's figures, public procurement accounted for less than 1.82% of the approximate total number of judicial review claims in 2011 (Approximately 200 public procurement claims of a total of over 11,000 JR cases-figures adopted from the *MoJ's consultation documents CP25/2012*.))

What is likely to happen next now the time limit has been reduced to 30 days?

- It is likely that issues pertaining to time will continue to rise. (In a similar fashion to that in 2009-2010.) Possibly so as to see how the developed *Uniplex* judgement should be interpreted alongside the reduced 30 day time limit.
- Possibility of a rush to litigation? With predictions that 50% of judicial review claims are settled out of court, will the increased time constraints have the opposite affect of causing an increase in claims? *(Contrary to the Reform's intentions)*

Conclusions and Future Research?

- ✓ The Government intended for the reforms to help reduce the number of judicial review claims going to the Administrative Courts, so that only legitimate, genuine claims can proceed promptly. However the overall number of public procurement claims in this area are very minimal, and in light of the case law findings and analysis, reducing the time limit could instead have the opposite effect on the number of claims being brought to the Courts.
- ✓ Nevertheless, while the overall number of claims are minimal, the role and function of public procurement judicial review has changed in recent years: there is evidence to suggest more allegedly aggrieved claimants are pursuing the judicial review route, (as they feel the issues are sometimes better addressed by invoking public law obligations). Similarly public procurement claims are being brought in more areas, such as irrationality.
- ✓ **Future Research:** To look at the impact and differences in traditional public law judicial review, compared with commercial judicial review. (Using public procurement as a case study for such analysis.)

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